

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID REEDY,

Plaintiff,

vs.

MICHAEL WEST, et al.,

Defendants.

Civil Action No. 16-CV-13876

HON. BERNARD A. FRIEDMAN

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is presently before the Court on defendants' motion for summary judgment [docket entry 15] in which defendants argue that plaintiff, a Michigan prison inmate, failed to exhaust his grievance remedies prior to bringing suit. Magistrate Judge Elizabeth A. Stafford has submitted a Report and Recommendation ("R&R") in which she recommends that defendants' motion be denied. Defendants have filed objections to the R&R, and plaintiff has responded to defendants' objections. Under Fed. R. Civ. P. 72(b)(3), the Court reviews de novo those portions of the R&R to which a proper objection has been made.

Having reviewed the motion papers, the R&R, defendants' objections, and plaintiff's response, the Court concludes that the magistrate judge correctly recommended that defendants' motion for summary judgment be denied. "[B]ecause the failure to exhaust is an affirmative defense on which defendants bear the burden of proof, it may 'serve as a basis for dismissal only if raised and proven by the defendants.'" *McClain v. Mason County, Ky.*, 618 F. App'x 262, 265 (6th Cir. 2015) (quoting *Kramer v. Wilkinson*, 226 F. App'x 461, 462 (6th Cir. 2007)). Defendants have not shown that plaintiff failed to exhaust his grievance remedies because, as the magistrate judge noted, they have not produced a copy of plaintiff's "03B" grievance, which is the factual predicate for this

argument. The 03B grievance was not exhausted, and two subsequent grievances were not “properly” exhausted because, according to defendants, the latter grievances were duplicative of the 03B grievance. As the magistrate judge correctly observed, “[t]he Court cannot assess whether the later grievances are truly duplicative of the first” because defendants have not produced the first so that the Court may compare it with the others. R&R at 6. Defendants have not answered this argument and this by itself warrants denying their motion for summary judgment. Defendants’ other objection, regarding the magistrate judge’s interpretation of an MDOC policy directive, is therefore moot. Accordingly,

IT IS ORDERED that Magistrate Judge Stafford’s R&R is hereby accepted and adopted as the findings and conclusions of the Court.

IT IS FURTHER ORDERED that defendants’ motion for summary judgment is denied.

S/ Bernard A. Friedman_____
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: July 6, 2017
Detroit, Michigan